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No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal criminal defendant, whose new appellate counsel fails to raise, on direct appeal, a claim of ineffective assistance of trial counsel, is procedurally barred from asserting that constitutional claim in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2255.[1]

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[1] The scale and urgency of this issue is amplified by the direct conflict between the Second Circuit and virtually all other Circuit courts that have considered this issue. The fact that the Solicitor General advocates that all ineffectiveness claims should be raised in § 2255 proceedings, rather than on direct appeal, lends enormous force to this Petition as well.

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Petitioner Joseph Massaro respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding. The opinion was filed on November 2, 2001.

OPINIONS BELOW

(1) The order of the Second Circuit, dated January 14, 2002, denying Petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc*" is reprinted in the Appendix hereto, App. 1-2, *infra*.

(2) An unpublished "summary order" of the Second Circuit, dated November 2, 2001, affirmed a District Court order that denied Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. That opinion is reprinted in the Appendix hereto, App. 3-10, *infra*.

(3) Petitioner had originally filed his § 2255 motion in April of 1997, together with a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, in the District Court for the Southern District of New York. In an unpublished memorandum opinion and order dated May 11, 1998, District Judge Miriam Goldman Cedarbaum ruled that the § 2255 motion was timely, and the motion for a new trial was timely in part and untimely in part. That opinion is reprinted at App. 11-15, *infra*.

(4) Some three-and-a-half years after the Petitioner filed his § 2255 motion, on November 29, 2000, District Judge Cedarbaum, in an unreported opinion, denied both the motion for a new trial and the § 2255 application. That opinion is reprinted at App. 16-26, *infra*.

(5) On December 26, 2000, Judge Cedarbaum granted a certificate of appealability on the issue of whether Petitioner's claim of his ineffectiveness of trial counsel is procedurally barred from being raised in a § 2255 proceeding where new appellate counsel never argued, on direct appeal, that his

attorney was ineffective for not accepting a continuance after being confronted with a newly discovered bullet that the Government claimed connected Petitioner to the murder for which he was convicted. That certificate appears at App. 27, *infra*.

(6) On March 14, 2001, the Second Circuit expanded the certificate of appealability to include a second issue: "[W]hether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal." App. 28-29, *infra*.

(7) Still earlier, on May 18, 1995, the Second Circuit affirmed, in an unpublished opinion, Petitioner's conviction of murder and life sentence. *United States v. Massaro*, 57 F.3d 1063 (2d Cir. 1995) (Table). The Second Circuit's opinion is reproduced at App. 30-37, *infra*. Thereafter, on October 16, 1995, this Court denied certiorari. *Massaro v. United States*, 516 U.S. 933 (No. 95-461) (1995).

JURISDICTION

The opinion and judgment of the Second Circuit were filed on November 2, 2001. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Second Circuit on January 14, 2002. The 90-day period for filing this petition for certiorari expires on Monday, April 15, 2002. See Rule 30.1. The jurisdiction of this Court to review the ruling of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255, known as a habeas corpus statute, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF THE CASE

In 1992, Joseph Massaro, the Petitioner, was charged in ten counts of an 18-count indictment for racketeering and related RICO offenses. At the center of the indictment was a charge of murder in aid of a racketeering enterprise. On October 27, 1993, a federal jury convicted Petitioner of murder and all but one of the other RICO offenses. On July 26, 1994, Petitioner was sentenced to life imprisonment on the murder conviction, and is presently serving his sentence at the United States Penitentiary at Leavenworth, Kansas.[1] This petition deals solely with Petitioner's murder conviction, a murder that he has steadfastly denied committing.

In 1990, the dead body of Joseph Fiorito was found in the backseat of his car on the Long Island Expressway in Queens, New York. The police arrested Patrick Esposito, who, while removing his blood-soaked clothing, confided to his girlfriend that he had murdered Fiorito because of a dispute with him. Indeed, the record shows that Esposito's clothing was soaked in Fiorito's blood.

Esposito eventually plea bargained his way out of the murder charge on the condition that he testify that Petitioner, Joseph Massaro, shot and killed Fiorito in the car in which Fiorito's body was found. No bloody clothing was ever recovered from Petitioner; nor were any guns or bullets traceable to him. The police had thoroughly searched the backseat and floor carpeting of Fiorito's car but no bullets or bullet holes were found (Tr. 4184-92). Ultimately, the car was released by the police, and sold to a new owner. Thus,

[1] District Judge Cedarbaum sentenced Petitioner to life imprisonment on Counts One (RICO conspiracy), Two (substantive RICO violation), and Three (murder in aid of a racketeering enterprise). He was also sentenced to concurrent terms of imprisonment of 20 years and a fine of $240,000 on Counts Four, Five, Six, Seven, Eight, Nine and Ten. He was ordered to pay restitution of $104,100. Second Circuit Appendix at A.14.

there was absolutely no tangible or forensic evidence which, in any way, connected Petitioner to the murder.

Petitioner's trial commenced on September 7, 1993, three years after Fiorito's death. Opening statements had been made and the government's key witness, Esposito, had been on the witness stand for three days when the prosecutor suddenly, and without any prior warning, surprised the defense with a *bullet* which he later alleged incriminated Joseph Massaro. It seems that on the eve of trial, the new owner of Fiorito's car produced for the prosecutor a bullet he claimed to have just discovered in the car. This bullet was the only physical evidence that connected the Petitioner to the murder.

Recognizing the dilemma confronting defense counsel, the trial judge "repeatedly encouraged" him to accept an adjournment of the proceedings so that a proper investigation of this new and apparently inculpatory piece of evidence could be conducted.[2]

Despite these overtures, Massaro's counsel failed to accept any of these invitations to examine why and how a bullet could suddenly appear three years after the murder, and how such a piece of incriminating evidence could be discovered by the new owner of the car following thorough police searches of the car.

[2] During the oral argument of Petitioner's direct appeal from his conviction, the Second Circuit judges (Altimari, Jacobs, and Calabresi) were outraged that such a critical piece of evidence was withheld from Petitioner's counsel under these circumstances. Judge Calabresi declared that the prosecutors were holding back the bullet "in their vest pocket," and the court's opinion affirming the conviction declared that "the government should have advised the defense immediately of the bullet's discovery." Second Circuit Appendix at A.138 and App. 36, *infra*. The Second Circuit found, however, that the Government conduct "did not irreparably damage Massaro's strategy . . . Massaro has not claimed that he would have changed his cross-examination [of Esposito] had he been aware of the bullet." *Id*

Nevertheless, counsel went forward with the trial. What is worse, he accepted the Government's representations that the bullet was connected to the murder (Tr. 1994-95). He also agreed with the Government's ballistic expert's opinion that the bullet matched fragments taken from the victim's head (Tr. 3753-58), rather than conducting his own in-depth investigation. The trial continued without any pause and the bullet was received in evidence. Joseph Massaro was convicted of the murder and sentenced to life imprisonment.

On his direct appeal, new counsel claimed that the District Court erred in admitting the bullet in evidence. He also briefed the issue of the Government's delay in disclosing the bullet until well into the trial. The Second Circuit, nevertheless, affirmed the conviction.[3] App. 30-37, *infra*.

Later, after Massaro's appellate process was exhausted, new counsel, engaged to bring a habeas petition, uncovered after a proper investigation of the bullet that the physical evidence showed that the shooting in the car could *not have occurred* in the manner described by Esposito, and that it was highly unlikely that the bullet was connected with the shooting of Fiorito. Second Circuit Appendix at A.176, 184-85. As a consequence, Massaro, for the very first time, was able to assert a valid and cognizable ineffectiveness claim under the standards fixed in *Strickland v. Washington*, 466 U.S. 668 (1984). But, by then, Petitioner's direct appeal had been

[3] This Court denied certiorari on the direct appeal on October 16, 1995. *Massaro v. United States*, 516 U.S. 933 (No. 95-461). The two issues presented in that petition were (1) "whether there was sufficient effect on interstate commerce to warrant this criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951," and (2) "whether the Government's failure to disclose the discovery of a crucial piece of evidence, to wit, a matching bullet, until after opening statements and cross-examination of a witness [Esposito] had begun violates a defendant's rights under the Due Process Clause?" No issue of ineffectiveness of counsel in failing to investigate the sudden appearance of the bullet was presented to this Court in that 1995 petition.

exhausted. Thus, Petitioner was forced to bring his ineffectiveness claim in the instant § 2255 proceeding.

The District Judge held that Petitioner was "procedurally barred" from raising the ineffectiveness since it had not been asserted on direct appeal. App. 24-25, *infra*.

The Second Circuit affirmed, relying on its controversial decision in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). *Billy-Eko* holds that (1) where a defendant is represented by new counsel on direct appeal, and (2) when the claim that trial counsel was ineffective is based "solely on the record developed at trial," the defendant is procedurally barred from raising the issue in a subsequent § 2255 proceeding. The narrow exception to the *Billy-Eko* rule is where the defendant can establish cause for the failure to raise the issue on direct appeal *and* actual prejudice resulting from that failure. Since Petitioner's ineffective assistance claim was foreclosed by the *Billy-Eko* standard, and he did not establish any cause for his failure to raise the issue on direct appeal or any prejudice, the Second Circuit concluded that Petitioner procedurally forfeited his ineffectiveness claim. As a consequence, he was "procedurally barred" from raising it in the subsequent § 2255 proceeding. App. 6-8, *infra*.

Because of this procedural default, no court has ever addressed the merits of Joseph Massaro's claim that his trial counsel's failure to seek a continuance or adequately investigate the bullet denied him his constitutional right to the effective assistance of counsel guaranteed under the Sixth Amendment.

REASONS FOR GRANTING CERTIORARI

1. THE SECOND CIRCUIT'S RULING, IMPOSING A "PROCEDURAL BAR" FROM RAISING CERTAIN INEFFECTIVENESS OF COUNSEL CLAIMS IN A § 2255 PROCEEDING, CONFLICTS WITH RULINGS OF OTHER CIRCUITS AND THE POSITION CONSISTENTLY TAKEN BY THE SOLICITOR GENERAL

The Second Circuit's rule, holding that a defendant who has new counsel on direct appeal is *barred* from challenging his trial attorney's ineffectiveness in a § 2255 habeas proceeding, is in direct conflict with the rulings of virtually all other Circuit courts that have addressed this issue.[4] The Second Circuit's approach is also contrary to the position taken by the Solicitor General of the United States.

[4] Nearly every Circuit court has followed the rule that ineffectiveness claims should be brought in habeas petitions, rather than on direct appeal. *See, e.g., United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998), *cert denied*, 526 U.S. 1059 (1999); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3rd Cir. 2002); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, No. 00-10790, 122 S. Ct. 181 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *petition for cert filed* (March 20, 2002) (No. 01-9266); *United States v. Blaze*, 143 F.3d 585, 593 (10th Cir. 1998).

Many Circuits also recognize that a defendant should not be barred from bringing an ineffectiveness claim in a § 2255 petition. *See United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*) ("[n]o procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction proceedings instead"); *United States v. DeRewal*, 10 F.3d 100, 104 n.2 (3rd Cir. 1993) (a defendant is not required to show cause and prejudice for his failure to raise counsel's ineffectiveness on direct appeal), *cert. denied*, 511 U.S. 1033 (1994).

As noted in *United States v. Cronic*, 466 U.S. 648, 666, n.42 (1984):

> The Government argues that a defendant can attack the actual performance of trial counsel *only* through a petition for postconviction relief under 28 U.S.C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly in the District Court nor preserved for review on appeal (emphasis added).

While this Court did not find it necessary in *Cronic* to address the merits of that proposed rule, the Solicitor General has adhered to its stand whenever this issue has come before the Court. In fact, the Solicitor General confessed error in *Billy-Eko v. United States*, 509 U.S. 901 (1993), "arguing that for reasons of uniformity and efficient judicial administration, the Government now supported a blanket rule that failure to raise claims of ineffective assistance of counsel on direct appeal *never* constitutes procedural default."[5] *See* Brief for the United States at 5-9 (No. 92-7897).

Based upon the logical and practical position asserted by the Solicitor General, this Court's response has been to grant certiorari, vacate the judgment below, and remand the case to the Circuit "for further consideration in light of the position asserted by the Solicitor in his brief for the United States." *See, e.g., Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990).

In spite of the overwhelming authority to the contrary, the Second Circuit remains attached to its extreme position even though this Court has encouraged it to reconsider its stance

[5] David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 Georgetown Law Journal 2079, 2104 (July 1994) (emphasis supplied).

because of the Solicitor General's compelling call for uniformity. *Billy-Eko v. United States*, 509 U.S. 901 (1993).[6]

It is worth noting that in *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993), the Seventh Circuit seemed to advocate an approach similar to that of the Second Circuit — finding a waiver of any ineffectiveness claim that could have been asserted by new counsel on direct appeal. However, in an incisive and thoughtful concurrence, Judge Frank H. Easterbrook denounced the majority's decision that directed district judges "to enforce a forfeiture rule that neither prosecutors nor prisoners want." 6 F.3d at 475-76 (Easterbrook, J., concurring).

Judge Easterbrook also indicated that only three Circuits (Second, Seventh and Tenth) had supported the forfeiture of ineffective assistance claims when not presented on direct appeal. 6 F.3d at 475 (Easterbrook, J., concurring). However, since then, the Tenth Circuit has altered its position and *expressly rejected* any waiver doctrine. *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995). And, even the Seventh Circuit, although never expressly overruling its decision in *Guinan*, is "generally reluctant to hear ineffective assistance of counsel claims on direct appeal because most trial records, unsupplemented by a 28 U.S.C. § 2255 hearing, lack the evidence necessary to fashion a successful claim." *United States v. Pergler*, 233 F.3d 1005, 1009 (7th Cir. 2000).

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[6] On remand in *Billy-Eko*, the Second Circuit did not consider or follow the Solicitor General's position. Instead, it developed its own notion that the defendant would be precluded from raising ineffective counsel claims in § 2255 proceedings where new appellate counsel could have raised the claims on direct appeal because the ineffectiveness was developed on the trial record. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). That is the novel ruling that the Second Circuit found controlling in this case.

Thus, we have identified three recognized approaches to this perennial issue:

(1) The Solicitor General suggests, for purposes of uniformity, that all ineffectiveness claims should be raised in a § 2255 habeas petition, rather than on direct appeal;

(2) the Tenth Circuit, *en banc*, holds that ineffectiveness claims should be brought in a § 2255 proceeding, but, for purposes of efficiency, claims which are fully developed in the record *may* be brought on direct appeal *or* under § 2255. However, no procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction proceedings instead. *Galloway*, 56 F.3d at 1242; and

(3) the Second Circuit adheres to the extreme position that ineffectiveness claims may *not* be brought in a § 2255 proceeding where the defendant has new counsel on direct appeal and the ineffectiveness is fully developed on the trial record. Under those circumstances, a defendant *must* bring the claim on direct appeal unless he can show cause for why the claim was not brought on appeal, and prejudice resulting therefrom. *Billy-Eko*, 8 F.3d at 114-15.

It is impossible to reconcile the Second Circuit's approach taken in the Petitioner's case with (1) nearly all the other Circuits; and (2) the position of the Solicitor General; and (3) the reasoning of the *en banc* decision of the Tenth Circuit, which expressly holds:

> The rule in this circuit, then, is that claims of constitutionally ineffective counsel should be brought on collateral review, in the first petition filed under 28 U.S.C. § 2255. Some rare claims which are fully developed in the record may be brought either on direct appeal or in collateral proceedings. No procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction

proceedings instead. *United States v. Galloway*, 56 F.3d at 1242.

This issue is of considerable importance to judges, prosecutors and defense attorneys throughout the country who have been calling for resolution of this critical issue.[7] Now is the time for this Court to resolve this disruptive conflict of authority. The basic unfairness of the Second Circuit's procedural trap to litigating ineffectiveness claims in § 2255 proceedings adds to the appropriateness of granting certiorari in this case.

[7] Significantly, in 1995, a petition for certiorari was filed by a petitioner from the Second Circuit raising the question of "Whether the courts below correctly resolved petitioner's allegations of ineffective assistance of counsel, first raised in a post-conviction motion under 28 U.S.C. § 2255." *Sprecher v. United States*, No. 95-82, *cert. denied*, 516 U.S. 913 (1995). The Solicitor General's brief in opposition stated that "whatever tension exists between the rule generally followed by all the courts and the narrow limitation on that rule established by the Second Circuit is not present in the instant case." The Solicitor General emphasized that there "the district court actually considered each aspect of petitioner's ineffectiveness claim, so the different rule followed by the Second Circuit in certain circumstances actually made no difference in petitioner's case." Solicitor General's Br. at 9. The Solicitor General concluded that "whatever limitation the Second Circuit places on the general rule for presenting claims of ineffective assistance of counsel has had no effect on the outcome of this case." *Id.* at 10-11. In contrast, here neither the district court nor the Second Circuit ever addressed the merits of Joseph Massaro's claim that he was denied the effective assistance of counsel where his attorney failed to accept the court's offer of a continuance of the trial to adequately investigate the issues presented by the Government's belated disclosure of the bullet.

2. CERTIORARI SHOULD BE GRANTED TO DETERMINE THE RECURRING AND IMPORTANT QUESTION OF WHEN INEFFECTIVENESS OF COUNSEL CLAIMS SHOULD BE RAISED

Because of the mass of case law that has developed relating to a defendant's right to the effective assistance of counsel, which continues to be an issue of great concern in all federal courts, it is evident that this Court should give some definitive guidance as to an appellate attorney's obligations relating to such claims.

This Court has recognized that "[b]ecause collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

The Second Circuit's exceptional stance requires new counsel to raise on direct appeal any ineffectiveness of the trial attorney that conceivably may have been developed at trial. However, this ignores the reality that the trial attorney may well be advising and cooperating with the new appellate counsel, which inevitably impairs the raising of such a claim.

Moreover, questions concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record can be immensely complicated. For example, was a full evidentiary hearing conducted on the record as to the specific issue or was, as in Joseph Massaro's case, it merely mentioned a few times during the course of the trial? Did counsel have a thorough opportunity to explain his conduct? As recognized by the Tenth Circuit, sitting *en banc*, "at the very least counsel accused of deficient performance can explain their reasoning and actions, and the district court

can render its opinion on the *merits* of the claim." *Galloway*, 56 F.3d at 1240 (emphasis supplied).

And, even if the facts giving rise to counsel's ineffectiveness may be fully spelled out on the trial record, the *prejudice* to the defendant through counsel's deficient performance, required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent on direct appeal. For example, on Joseph Massaro's direct appeal, counsel had no basis to assert the trial lawyer's failure to obtain an adjournment as an issue because, based on the record, the bullet was linked to the murder. It was only after that a proper investigation uncovered the *prejudice* of counsel's failures in assuming that the bullet matched the fragments in Fiorito's head, and refusing the court's offer of a continuance to conduct a proper investigation.

In addition, under the Second Circuit's approach, appellate counsel, who is actually bound by the trial record, must himself undertake investigations to find prejudice, required under *Strickland*, which will require exploration outside the boundaries of the trial. Such a requirement places an unreasonable, as well as an unbearable, burden upon appellate counsel. And, if he does not do so, he may face an ineffectiveness claim *himself*, either for not conducting the investigation or not raising the claim. Thus, in practical application, the *Billy-Eko* exception represents a marked departure from the more reasonable rule adopted by the other Circuit courts and advocated by the Solicitor General. As a consequence, judged from the infallible distance of time, *Billy-Eko* is unworkable and continues to generate confusion.

As indicated earlier, recognizing the severity of waiver, the Second Circuit created a narrow exception to the *Billy-Eko* doctrine of procedural forfeiture whereby the failure of new appellate counsel to raise a fully developed ineffectiveness claim on direct appeal can be excused "only if the

defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulted therefrom." App. 7, *infra*.

However, the "cause and prejudice" exception is unwieldy and unworkable. As observed by the Tenth Circuit,

> if procedural bar is raised as a defense, it embroils us in nonmerits issues which are as time consuming as if we went straight to the merits, and infinitely less productive. Applying, as we must, the cause and prejudice standard for avoiding the procedural default, we must first examine all the reasons advanced as cause, and write on the subtext after revisiting everything that happened on direct appeal, and then some. In conjunction, or as an alternative, we must examine prejudice, which is nothing less than evaluating the merits to determine whether we should evaluate the merits. Nothing productive is accomplished. *Galloway*, 56 F.3d at 1242.

The Third Circuit also concluded that the burdensome "cause and prejudice" standard does not apply to an ineffective assistance of counsel claim asserted in a § 2255 petition. *United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993) (the requirement would lead to unnecessary confusion and a proliferation of litigation regarding alleged procedural defaults), *cert. denied*, 511 U.S. 1033 (1994).

More than 50 years ago, Justice Felix Frankfurter eloquently wrote that "[l]aw triumphs over natural impulses aroused by such a [shocking] crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt." *Fisher v. United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting). Here, those indispensable safeguards were denied to Joseph Massaro because of counsel's ineffectiveness taken in combination with the prosecutor's

action in withholding the bullet in his "vest pocket" until after the trial commenced.

But, the true injustice is the failure of the District Court and Second Circuit to address the merits of Joseph Massaro's ineffectiveness claim. The court never heard any explanation from trial counsel as to why he declined the judge's repeated offers of a continuance, and why he failed to conduct proper investigations in this murder trial. Under the mantle of *Billy-Eko*, defendants, like Joseph Massaro, will be deprived of *any* safeguards where certain ineffectiveness claims are presented on collateral attack, rather than on direct appeal.

Prisoners who have been mistakenly convicted, because of constitutional errors, suffer a grievous wrong and should be entitled to a hearing into the substance of their claims. This is especially true where a defendant has received such a severe sentence. The absence of full adversary testing of these constitutional claims, which is available in § 2255 proceedings rather than on direct appeal, cannot help but erode our confidence in the criminal justice system and degrades the right to the effective assistance of counsel. And, lawyers "who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan*, 6 F.3d at 476 (Easterbrook, J., concurring).

CONCLUSION

Joseph Massaro has been condemned to prison for the rest of his life and denied the opportunity to argue the ineffectiveness of his counsel because the Second Circuit concluded that his constitutional claim was procedurally barred by its harsh *Billy-Eko* exception to the general rule that ineffectiveness claims should always be raised on collateral attack. For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourteenth day of January two thousand two.

UNITED STATES COURT OF APPEALS
FILED JAN 14 2002
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

JOSEPH MASSARO,

Petitioner-Appellant,

V. Docket No.: 00-2720

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Joseph Massaro.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE. Clerk

By: /s/ Art Heller
Art Heller.
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT. BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE. IN A RELATED CASE. OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit. held at the United States Courthouse. Foley Square. in the City of New York. on the 2nd day of November two thousand and one.

PRESENT:

HON. CHESTER J. STRAUB.
HON. ROBERT A. KATZMANN.
HON. FRANK J. MAGILL*
Circuit Judges.

JOSEPH MASSARO.

Petitioner-Appellant.

No. 00-2720

SUMMARY ORDER

–v–

UNITED STATES OF AMERICA.

Respondent-Appellee

* The Honorable Frank J. Magill. of the United States Court of Appeals for the Eighth Circuit. sitting by designation.

Appearing for Petitioner-Appellant:

David N. Kelly, Assistant United States Attorney for the Southern District of New York (Mary Jo White, United States Attorney, and Celeste L. Koeleveld, Assistant United States Attorney, on the brief) New York, NY.

Appearing for Respondent-Appellee:

Herald Price Fahringer of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP (Erica T. Dubno on the brief) New York, NY.

Appeal from the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*.)

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Petitioner-Appellant Joseph Massaro appeals from an order entered in the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. On appeal, Massaro contends that the District Court incorrectly determined that his claims of ineffective assistance of counsel were procedurally barred. For the foregoing reasons, we reject Massaro's claims and deny his petition for a writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 1993 a jury found Massaro guilty of numerous racketeering crimes, including murder, extortion, arson, and loansharking. Massaro, a member of the Luchese Organized Crime Family, ran an organization called the Entertainment Plus Agency that booked topless dancers for clubs on

Long Island. In the late 1980's, Massaro sought to expand his control over Long Island's topless bar industry and engaged in a campaign of intimidation against club owners who would not utilize his services. In 1989, Massaro discovered that one of his associates, Joseph Fiorito, was stealing from him. Together with another associate, Massaro lured Fiorito to an empty house where Massaro shot Fiorito once in the head. When transporting the body in an automobile Massaro discovered that Fiorito was not dead, and therefore shot him again in the head. On September 21, 1989, New York City police discovered Fiorito's body, still in the car where he had been shot for the second time. Although the police found a spent shell casing in the car, they did not initially find a bullet or blood in the front seat. The car was released from state custody without being thoroughly searched. Massaro was arrested in 1992 after an associate, Patrick Esposito, who was cooperating with police provided information implicating Massaro.

Trial commenced on September 7, 1993. Several days before trial, the new owner of the car in which Fiorito's body was found discovered a hole in a floorboard and a bullet. On September 6, 1993, the government was advised of the discovery but did not inform Massaro's counsel until September 11th. In the meantime, Massaro's counsel had delivered an opening statement arguing that Esposito alone murdered Fiorito and that no physical evidence linked Massaro to the crime. On September 23, 1993 the prosecution for the first time raised the issue of the bullet with the court. At that time, Massaro neither sought to preclude the bullet nor requested a continuance pending forensic results. On September 27, 1993, the prosecution advised Massaro that the bullet matched fragments recovered from Fiorito's body and had been fired by the same gun. Massaro then moved to preclude admission of the bullet due to the late discovery. The court rejected the motion but offered a continuance so that Massaro's counsel

could examine the evidence and adjust his legal strategy. Massaro's counsel declined the continuance.

Massaro was convicted on all counts and sentenced to life imprisonment, a $240,000 fine, and restitution. On direct appeal, we affirmed Massaro's conviction in an unpublished order, *United States v. Massaro*, 57 F.3d 1063 (2d Cir. 1995) (unpublished order), and the Supreme Court denied certiorari, *see Massaro v. United States*, 516 U.S. 933 (1995). Massaro then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2255 alleging several grounds upon which he should be granted a new trial. The District Court rejected all of Massaro's arguments. In addition to rejecting most arguments on the merits, the court found that several of his claims were procedurally barred because they were not raised on direct appeal. The District Court, however, granted Massaro a certificate of appealability on the issue of whether it correctly determined that Massaro's claim that his counsel acted ineffectively when he refused a continuance was procedurally barred. On March 14, 2001, we expanded the certificate of appealability to include a second issue, namely, "whether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal."

DISCUSSION

Massaro's first argument is that he was denied a fair trial when his trial counsel failed to accept a continuance after the government sought to introduce the bullet into evidence. The District Court found that this claim was procedurally barred because Massaro's appellate counsel failed to raise it on direct appeal. As a general matter, a federal prisoner cannot employ § 2255 to litigate issues that could have been, but were not, raised on direct appeal. *Douglas v. United States*, 13 F.3d 43, 46 (2d Cir. 1993). Failure to raise a claim on direct appeal ordinarily results in procedural default precluding appellate

review of the issue. *United States v. Helmsley*, 985 F.2d 1202, 1205 (2d Cir. 1992). In *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), we created a limited exception to this general rule for ineffective assistance claims. Because when one attorney serves as both trial and appellate counsel it is unlikely that an attorney would raise an ineffective assistance claim against himself, such claims will not ordinarily be procedurally barred even if not raised on direct appeal. *Billy-Eko*, however, made clear that when (1) the defendant was represented by new counsel on direct appeal, and (2) when the ineffective assistance claim was based "solely on the record developed at trial," the normal rules of exhaustion will still apply. 8 F.3d at 113–14. When these two conditions are met, the failure to raise ineffective assistance claims on direct appeal will be excused only if the defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulting therefrom. *See id.*

In the instant case, it is undisputed that Massaro was represented by different counsel during direct appeal of his conviction. It is also clear that the basis for Massaro's claim of ineffective assistance of counsel for failure to accept a continuance is based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal. At trial, Massaro's counsel engaged in many discussions about the decision not to accept a continuance. For example, on September 28th, Massaro's trial counsel explained to the court that a continuance was unnecessary because a ballistics expert had already been retained and an examination of the bullet could be accomplished quickly. And in fact, Massaro's forensic expert in short order concurred with the assessment of the government experts in that the bullet matched the fragments in Fiorito's head. The fact that a new set of experts allegedly reached different conclusions after trial does not render the basis for Massaro's ineffective assistance claim outside the scope of the record adduced at trial. Moreover, each of the issues raised by Massaro's most recent forensic analysis —

the absence of blood in the vehicle, the absence of blood "spatter" or other remnants, the belated discovery of the bullet after several searches — all were extensively addressed at trial. In short, the record available to Massaro's appellate counsel fully revealed the implications of the failure to accept a continuance. Therefore, Massaro's counsel should have raised the claim on direct appeal; the failure to do so means that the claim is procedurally defaulted.

When a claim is defaulted, collateral review of the claim is available only if the petitioner is able to demonstrate cause for the default and prejudice resulting therefrom. *See, e.g., Bousley v. United States*, 523 U.S. 614, 622-24 (1998). This Massaro is unable to do. In order to demonstrate cause, a petitioner must be able to show that the factual basis for a claim was not reasonably available, despite the exercise of reasonable diligence. *See Helmsley*, 985 F.2d at 1205–08. As discussed immediately above, the basis for Massaro's claim was fully available to his appellate counsel. Thus, Massaro would be unable to establish cause necessary to overcome a procedural default.

Massaro's other claim is that the District Court erred in concluding that Massaro's ineffective assistance of counsel claim based on counsel's alleged refusal to allow Massaro to testify was procedurally barred. Here, the government agrees with Massaro that the District Court erred in dismissing this aspect of Massaro's § 2255 petition as procedurally barred. The government does so in light of *Chang v. United States*, 250 F.3d 79, 84 (2d Cir. 2001), where we held that a petitioner's ineffective assistance claim based on counsel's refusal to allow the petitioner to testify was not procedurally barred by failure to raise the claim on direct appeal. *Chang*, however, is easily distinguishable from the instant situation. In *Chang* we explicitly noted that the petitioner's claim "involve[d] off-the-record interactions with his trial counsel and therefore cannot be determined by examining the motion, files, and

records before the district court." Because the claim in *Chang* was not based solely on the trial record, the claim fell within *Billy-Eko* and thus was not procedurally barred. The other cases cited by Massaro similarly involve allegations of improper conduct or other circumstances outside the bounds of the trial court record. *See Amiel v. United States*, 209 F.3d 195, 198 (2d Cir. 2000) ("Appellant was represented by new counsel on direct appeal, but her claim is based on events outside the trial record, namely, counsel's alleged off-the-record statements and alleged disloyal reasons for failing to pursue a reasonable trial strategy."); *Armiem v. United States*, 234 F.3d 820, 825 (2d Cir. 2000) ("These issues implicate actions taken by counsel outside the presence of the trial judge and therefore could ordinarily be resolved by him without such a hearing."). Here, Massaro has alleged no facts or circumstances surrounding his trial counsel's decision to disallow Massaro from testifying. Instead, Massaro's claim is based only on the conclusory statement that "[h]ad Mr. Massaro been allowed to [testify], there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Under such circumstances, Massaro has not alleged any facts that are outside the record developed at trial. Because Massaro was represented by different counsel on appeal, and because the facts and circumstances surrounding his second ineffective assistance claim are based on the record developed at trial, the claim is procedurally defaulted. *See Billy-Eko*, 8 F.3d at 113–14. And as with his first ineffective assistance of counsel claim, Massaro is unable to satisfy the cause and prejudice test necessary to overcome a procedural default. *See Bousley*, 523 U.S. at 622–24.

Accordingly, the judgment of the District Court is AFFIRMED.

FOR THE COURT

Roseann B. MacKechnie. Clerk

By: /s/ Oliva M. George

Oliva M. George. Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO.

Petitioner.

-against-

UNITED STATES
OF AMERICA.

Respondent.

S1 92 Cr. 529 (MGC)
97 Civ. 2971 (MGC)

MEMORANDUM OPINION
AND ORDER

CEDARBAUM, J.

Joseph Massaro, a person in custody under a sentence of this Court, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and a new trial pursuant to Federal Rule of Criminal Procedure 33. At my direction, the parties have submitted memoranda of law on the timeliness of these applications. For the reasons discussed below, the § 2255 petition is timely, and the motion for a new trial is timely in part and untimely in part.

1. Petition for a Writ of Habeas Corpus

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), effective April 24, 1996, amended 28 U.S.C. § 2255 to add the following time limitation:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if

the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

On October 27, 1993, a jury found Massaro guilty of numerous racketeering crimes, including murder, extortion, arson and loansharking. Massaro was sentenced on July 26, 1994. The Second Circuit affirmed petitioner's judgment of conviction on May 18, 1995, and issued its mandate on June 9, 1995. On October 16, 1995, the United States Supreme Court denied petitioner's petition for a writ of certiorari. On April 24, 1997, the Office of the Clerk of the Southern District of New York received Massaro's § 2255 petition.

In analyzing the period of limitations applicable under 28 U.S.C. § 2244(d)(2), the Court of Appeals has held that if a petitioner applying for relief under 28 U.S.C. § 2254 has had several years to contemplate bringing a federal habeas corpus petition, it is not necessary to accord him a full year after the effective date of the AEDPA before applying the one-year statute of limitations. *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997); *see also Scott v. U.S.*, 1998 WL 2828, at *1 (S.D.N.Y. Jan. 6, 1998) (applying *Peterson* to petition brought pursuant to 28 U.S.C. § 2255); *Santana v. U.S.*, 982 F.Supp. 942, 944-945 (S.D.N.Y. 1997) (same).

The petition for a writ of habeas corpus was filed only 18 months after the judgment of conviction became final, and exactly one year after the effective date of the AEDPA. Thus,

the petition was filed within a reasonable period of time after the effective date of the AEDPA.

2. Motion for a New Trial

Federal Rule of Criminal Procedure 33 states that the court "on motion of the defendant may grant a new trial to that defendant if required in the interest of justice." Rule 33 further provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment" and that "[a] motion for a new trial based on any other grounds shall be made within 7 days after verdict." These time limits are jurisdictional. If a Rule 33 motion is not timely filed, the district court lacks power to consider it. *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir. 1984).

The motion for a new trial was filed on May 14, 1997, several years after Massaro's October 27, 1993 guilty verdict. To the extent that the motion is not based on newly discovered evidence, it is untimely under Rule 33, since it was filed more than seven days after the verdict. However, a motion based on newly discovered evidence may be brought within two years of "final judgment." Thus, the government concedes that if the motion for a new trial is based on newly discovered evidence, it is timely. *See* Letter from Assistant United States Attorneys David N. Kelly and Lisa P. Korologos of December 12, 1997, at 7 n. 10; *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995) (time limitation for Rule 33 motion based on newly discovered evidence runs from issuance of mandate of Court of Appeals).

The motion for a new trial is based on several pieces of evidence, only some of which can be considered "newly discovered" within the meaning of Rule 33. First, on the day before opening statements in Massaro's trial, the New York Police Department found a bullet in Joseph Fiorito's car, where Fiorito's body had been discovered three years earlier.

Massaro's trial counsel was offered a continuance in order to perform tests on the bullet, but he refused this opportunity and instead argued, unsuccessfully, for a mistrial or for preclusion of the bullet. Since the trial, Massaro's new counsel has had the bullet subjected to expert tests that purportedly show that the bullet was "planted" to corroborate the prosecution's case. Massaro apparently contends that these post-trial tests constitute "newly discovered evidence" within the meaning of Rule 33. The bullet was revealed before the close of the trial, however, and Massaro was offered a continuance in order to have tests performed on this evidence. Having learned of the bullet during trial, and having declined the opportunity to test the bullet during trial, Massaro cannot now contend that the post-trial tests conducted by his newly-retained experts qualify as newly discovered evidence permitting him to move for a new trial at this late date. Thus, to the extent that the motion for a new trial is based on evidence relating to the bullet found in Joseph Fiorito's car, it is untimely.

Second, Massaro claims more generally that new expert tests on the government's forensic evidence, conducted after the trial, cast doubt on the reliability of the government's evidence. There is no claim, however, that these tests are based upon evidence that was not available during trial. Rather, the only thing that is "new" about this evidence is the team of experts reviewing it. Such evidence is not "newly discovered" within the meaning of Rule 33. To the extent that the motion for a new trial is based on this evidence, it is untimely.

Third, Massaro claims that he recently has discovered that the government failed to turn over evidence showing that an important prosecution witness, Alfonse D'Arco, lied under oath about his involvement in drug trafficking. Massaro further claims that more than two years after Massaro's conviction, he learned of the existence of a psychological evaluation of D'Arco. According to Massaro, the government denied the existence of such an evaluation when it was requested by trial

counsel. This material is "newly discovered evidence" under Rule 33, and the motion for a new trial is not untimely to the extent that it is based upon this evidence.

Fourth, Massaro claims that before and during trial, the government failed to disclose purportedly exculpatory statements by Mark Carney, owner of a business that Massaro was alleged to have extorted. Massaro claims that this evidence was disclosed for the first time after trial, in the Presentence Investigation Report prepared by the Probation Department. The source of this evidence is unclear at this time, and it is not apparent whether this material is "newly discovered evidence" under Rule 33. Accordingly, to the extent that it is based on the purportedly exculpatory statements by Mark Carney referred to in the Presentence Investigation Report, it is not clear at this time whether the motion is untimely.

CONCLUSION

For the foregoing reasons, the motion for a new trial is dismissed as untimely except to the extent that it is based on the evidence related to Alfonse D'Arco and on the purportedly exculpatory statements made by Mark Carney. The respondent shall file a response to the petition for a writ of habeas corpus and to the motion for a new trial by July 13, 1998.

SO ORDERED.

Dated: New York, New York
May 11, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO.

Petitioner.

-against-

97 Civ. 2971 (MGC)

UNITED STATES OF AMERICA.

Respondent.

UNITED STATES OF AMERICA.

-against-

S1 92 Cr. 529 (MGC)

JOSEPH MASSARO.

Defendant.

OPINION

APPEARANCES.

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Cedarbaum, J.

Joseph Massaro, a person in custody under a sentence of this Court, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The grounds for Massaro's § 2255 petition include the following: (1) the government violated his constitutional right to due process when it presented false and misleading evidence concerning a bullet that was discovered on the eve of trial; (2) the government withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1993); (3) the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), changed the law regarding the required nexus to interstate commerce under the Hobbs Act, 18 U.S.C. § 1951; and (4) petitioner was denied effective assistance of trial counsel in violation of the Sixth Amendment.

The grounds for Massaro's Rule 33 motion essentially mirror some of his grounds for § 2255 relief. Massaro repeats his contentions regarding the bullet evidence and undisclosed *Brady* material, and claims that these constitute "newly discovered" evidence. In an earlier opinion on the Rule 33 motion, I held that Massaro's contentions regarding the bullet do not constitute "newly discovered" evidence within the meaning of Rule 33. *Massaro v. United States*, 1998 WL 241625 (S.D. N.Y. May 12, 1998). For the reasons discussed below, Mas-

saro's petition under § 2255 and the balance of his Rule 33 motion are denied.

I. Background

On October 27, 1993, a jury found Massaro, a soldier in the Luchese Organized Crime Family, guilty of numerous racketeering crimes, including murder, extortion, arson and loansharking, in his efforts to take over Long Island's topless bar industry. Massaro was sentenced on July 26, 1994 to life imprisonment and a $240,000 fine, as well as payment of restitution. In November 1994, Massaro, represented by new counsel, appealed his conviction, listing eight grounds of error. The Second Circuit issued an unpublished opinion affirming Massaro's conviction on May 18, 1995. On October 16, 1995, the United Supreme Court denied Massaro's petition for a writ of certiorari.

II. Discussion

A) *Claims that have been argued on direct appeal*

It is a well-settled rule that "Section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal." *Riascos-Prado v. United States*, 66 F.3d 30, 33 (2d Cir. 1995). Accordingly, Massaro's claims relating to the bullet evidence, as well as his claims concerning the requisite nexus to interstate commerce under the Hobbs Act, cannot be raised in a § 2255 petition. The only exception to this rule arises when the issue was not raised because of ineffective assistance of counsel, or when there has been an intervening change of law. *Underwood v. United States*, 15 F.3d 16, 18 (2d Cir. 1993). Neither of these exceptions applies to these claims.

1) Bullet Evidence

According to the evidence at trial, by the end of the summer of 1989, Massaro, believing that Joseph Fiorito, an associate in his crew, had been stealing from him, decided to kill

Fiorito. Together with Esposito, Massaro lured Fiorito to an empty home in Hauppauge. After shooting Fiorito in the head once in the basement of the house, Massaro, with Esposito's help, carried Fiorito through the house and placed the body in a sitting position on the rear seat of the car that had been driven by Fiorito. As they crossed New York City, Massaro expressed concern that Fiorito might not be dead, and again shot Fiorito in the head.

On September 21, 1990, Fiorito's body was discovered in the back seat of a car. The New York City Police Department's Crime Scene Unit examined the vehicle at the scene and found a shell casing on the floor of the rear passenger compartment. No additional ballistics evidence was recovered. At the time, the police were aware of only one wound — an entry wound — to Fiorito's head. The medical examiner subsequently established that Fiorito had been shot twice, and that there were two entry wounds and one exit wound on his head. After state criminal charges against Esposito were dismissed as a result of his cooperation with the government, the car used to transport Fiorito's body was released from state custody. Several days before trial commenced, police sergeant Carbone tracked down Fiorito's car, but was unsuccessful in searching for the second bullet. However, the car's new owner discovered a hole in the floorboard and a bullet, and on September 6, 1993, the day before opening statements, advised the government of the discovery.

The government waited until Saturday, September 11, 1993, to advise Massaro's lawyer, by faxed letter, of the existence of the bullet, and offered to make available a videotape reenactment of its discovery. When the trial resumed on Monday, Massaro's counsel did not mention the bullet. On Thursday, September 23, 1993, Massaro's counsel finally raised the issue with the Court and sought to expedite ballistics tests that were being conducted by the government. On Monday, September 27, 1993, the government advised Massaro that its

expert had concluded that the bullet matched the fragments recovered from Fiorito's body, and had probably been fired from the same gun. Massaro moved for a mistrial, or, in the alternative, to preclude admission of the bullet because of its late disclosure. The motion for a mistrial was denied and the bullet evidence was ruled admissible because the defense's position had not been irretrievably prejudiced by the government's delay. Nevertheless, Massaro was offered a continuance to allow him time to examine the evidence and make any necessary adjustments to his trial strategy. Moreover, Massaro was permitted to reexamine any witnesses in light of the newly discovered evidence. Massaro reexamined one investigator, but declined the continuance.

In an unpublished opinion, the Second Circuit described the government's delay as "regrettable," but concluded that it was not error to admit the evidence. 92 Cri. 529, Slip Op., 94-1447, at 5 (2d Cir. May 18, 1995). The Second Circuit stated that the late disclosure and the government's presentation of the bullet evidence had not "irreparably damaged Massaro's strategy" and "Massaro's failure to avail himself of the offer of a continuance calls into doubt the claim of error." *Id*

In his § 2255 petition, Massaro offers the affidavits of three forensic experts who question the government's conclusion that the discovered bullet came from the same gun as the bullet found in Fiorito's head. Massaro argues that his "new" experts demonstrate that the government presented "false and misleading" evidence in violation of Massaro's rights under the Fifth Amendment. However, Massaro's current argument simply repeats the argument that he has already unsuccessfully pursued in the Court of Appeals: the only difference is that Massaro has now added "new" experts to support his claim. But, these "new" experts are not newly discovered evidence. I have previously dismissed the bullet issue from the Rule 33 motion for precisely that reason: "There is no claim,

however, that these tests, are based upon evidence that was not available during trial. Rather, the only thing that is "new" about this evidence is the team of experts reviewing it. Such evidence is not "newly discovered" within the meaning of Rule 33." *Massaro v. United States*, 1998 WL 241625, at *5. Moreover, Massaro's claim of unfair prejudice has been rejected by the Court of Appeals.

2) Nexus to Interstate Commerce

Massaro's contention regarding the necessary nexus to interstate commerce under the Hobbs Act is also barred.[1] One of Massaro's eight grounds for appeal was that the government had presented insufficient evidence to demonstrate a link to interstate commerce. In his § 2255 petition, Massaro attempts to raise this argument once again by claiming that the government failed to satisfy its burden of proving a sufficient nexus to interstate commerce, and that the jury charge regarding the requisite jurisdictional element was erroneous. Recognizing that he had raised this ground on direct appeal, Massaro contends that, in light of the Supreme Court's holding in *United States v. Lopez*, 514 U.S. 549, 114 S.Ct. 1624 (1995), there has been an intervening change of law which enables him to relitigate this issue.[2] However, in *United States*

[1] The Hobbs Act provides: "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Massaro is challenging the jury's findings with respect to four RICO predicate acts (Racketeering Acts Two, Five, Six and Eight) and Count Six (conspiracy to extort Partner's Lounge).

[2] The opinion in *Lopez* was issued 9 days after Massaro's appeal was argued in the Second Circuit, and 22 days before the Court of Appeals' issued its unpublished decision affirming his conviction. Thus, it is not clear that the Second Circuit did not consider this decision before issuing its unpublished decision. The Court's unpublished decision did not discuss the jurisdictional issue.

v. *Farrish*, 122 F.3d 146 (2d Cir. 1997), the Second Circuit held that *Lopez* did not alter the interstate commerce element required under the Hobbs Act. Thus, Massaro's previously litigated jurisdictional claim does not come within the exception for an intervening change in the applicable law.

Farrish involved a conviction under the Hobbs Act for stealing cars from the Chelsea Parking Garage. There, the Second Circuit explained that "appellant argues that the Commerce Clause requires more than a de minimis effect on interstate commerce to trigger Hobbs Act jurisdiction . . . that *Lopez* changed the jurisdictional requirement of the Hobbs Act." *Id.* at 148. The Court concluded that: "*Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. . . . We find nothing in *Lopez* to suggest that the Court intended to heighten the threshold for establishing jurisdiction under [the Hobbs Act]. Accordingly, we reaffirm that to satisfy the jurisdictional element of the Hobbs Act, the Government need only show a 'minimal' effect on interstate commerce." *Id.* at 148-49. Without an intervening change in the applicable law, Massaro may not relitigate the same issues that he argued on direct appeal.

B) *Claims that could have been raised on direct appeal*

The Second Circuit has consistently held that a defendant who fails to raise an issue on direct appeal is barred, as a general rule, from raising it subsequently in an attempt to vacate judgment. *Riascos-Prado*, 66 F.3d at 34-35. Unless Massaro can show that "there was cause for failing to raise the issue, and prejudice resulted therefrom," he is procedurally barred from raising those claims that could have been raised on appeal. *United States v. Pipitone*, 67 F.3d 34, 38-(2d Cir. 1995). Therefore, Massaro's claim that the government's failure to turn over statements by Mark Carney in violation of *Brady v. Maryland* is procedurally barred.

Although there is greater latitude for petitioners to assert ineffective assistance of counsel claims for the first time in § 2255 petitions, rather than on direct appeal, because Massaro was represented by new counsel on appeal and each of the grounds he asserts to support this claim was apparent from the trial record, Massaro is procedurally barred from asserting his claims of ineffective assistance of counsel. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993) (superseded by statute on other grounds).

1) Carney's statements in Presentence Investigation Report

Racketeering Act Eight of Count One charged Massaro with conspiring to extort the "owners and operators . . . and persons associated with" the Carousel Lounge topless bar. The second and third parts of that Racketeering Act also charged Massaro with committing, and conspiring to commit, arson of that bar on three separate occasions. The Presentence Investigation Report, prepared January 13, 1994, reported that Mark Carney had related that "although his bar suffered three fires, he was at no time aware that Massaro was the perpetrator . . . he was never threatened nor were any attempts at extortion made against the Carousel Lounge . . . Carney reported that neither he nor his bar were victimized." Massaro contends that the failure to disclose these statements before his trial constitutes a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material to either guilt or to punishment." *Id.* at 87.

Carney's statements were clearly revealed in the Presentence Report. Massaro could have raised this *Brady* argument either at the time of sentence or on direct appeal. Massaro has not proffered any cause for his failure to raise this claim at those earlier opportunities. Nor does Massaro contend that the failure to raise the Carney statement on appeal resulted from

ineffective assistance of appellate counsel. Accordingly, I do not reach the merits of this issue which is barred procedurally.

2) Ineffective Assistance of Counsel

Massaro lists many "failures" of his retained trial counsel. These include contentions that his trial counsel: (1) failed to preserve a challenge to the jury instructions under the Supreme Court's opinion in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163 (1993); (2) failed to take advantage of the continuance or otherwise attend to the bullet evidence; (3) refused to allow Massaro to testify; (4) failed to interview or call "certain" witnesses; (5) failed to object to evidence of Massaro's state extortion conviction; (6) failed to insist that the jury be instructed that state law conspiracy requires proof of an overt act; (7) failed to object to the manner in which the jury reviewed the trial transcript; and (8) failed to object to the scope of Special Agent Pistone's testimony.

Each of these alleged defaults of counsel could have been raised by Massaro's new counsel on appeal and are thus procedurally barred. The Second Circuit has recognized that often it is inappropriate to impose a procedural bar on Sixth Amendment ineffective assistance of counsel claims raised for the first time in petitions for habeas corpus, because "resolution [of ineffective assistance] claims often requires consideration of matters outside the record on direct appeal," and because, in many instances, the defendant is represented by the same counsel at trial and direct appeal, making it "unrealistic to expect that trial counsel would be eager to pursue an ineffective assistance of counsel claim." *Billy-Eko*, 8 F.3d at 114. However, "if defendant has new appellate counsel on direct appeal, and the record is fully developed on the ineffective assistance claim, there is little reason to extend the defendant an unlimited opportunity to delay bringing the claim." *Id.* at 115. *See also Abbamonte v. United States*, 160 F.3d 925, 925 (2d Cir. 1998). Massaro was represented by new counsel on appeal, and each of the bases for his ineffective assistance of trial counsel could have been argued on direct appeal.

C) *Claims that are meritless*

Massaro's additional claims — that the government failed to turn over two pieces of information about Alphonse D'Arco that might have provided additional material for cross-examination, and that the government violated 18 U.S.C. § 201(c)(2) — lack merit.

1) D'Arco evidence

Alphonse D'Arco, Massaro's former boss in the Luchese Crime Family, was a witness at trial. Massaro contends that the government withheld information set out in an application for an eavesdropping warrant about D'Arco's involvement in narcotics, and that the government withheld a psychological profile of D'Arco. The government essentially concedes that it should have known that these documents existed. For the reasons discussed below, the government's failure to disclose these documents does not support a new trial.

As the Second Circuit has noted, "undisclosed impeachment evidence is not material in the *Brady* sense when, although 'possibly useful to the defense,' it is 'not likely to have changed the verdict.' For example, where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998) (internal citations omitted). Neither the eavesdropping application nor the psychological profile would have furnished significant additional bases to impeach D'Arco on cross-examination. At trial, D'Arco was impeached by his many admissions of past criminal activity. Moreover, D'Arco was not the main witness against Massaro. Indeed, D'Arco did not testify about any essential element of

the crimes charged, but rather provided an "insider's view" of the hierarchy and business dealings of the Luchese Family. D'Arco was only one of more than forty other witnesses, including several of the victims of Massaro's crimes, forensic experts and law enforcement witnesses, who helped establish the government's case against Massaro. As in *Avellino*, "the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence." *Avellino*, 136 F.3d at 257.

2) Singleton Claim

In his reply brief, Massaro raises, for the first time, a claim based on the Tenth Circuit's opinion in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The opinion he relies on has been overruled by the Tenth Circuit sitting *en banc*, 165 F.3d 1297 (10th Cir. 1999), and has been rejected by the Second Circuit in *United States v. Stephenson*, 183 F.3d 110, 118 (2d Cir. 1999).

III. **Conclusion**

For the foregoing reasons, this petition and this motion for a new trial are denied.

SO ORDERED.

Dated: New York, New York
November 29, 2000

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

97 Civ. 2971 (MGC)

Certificate of Appealability

CEDARBAUM, J.

Joseph Massaro has requested that I issue a certificate of appealability to enable him to appeal my recent decision denying his motion pursuant to 28 U.S.C. § 2255. A certificate of appealability can only issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

The only issue that warrants a certificate of appealability is whether trial counsel's decision not to accept a continuance after receiving important new information from the government, which Massaro now characterizes as a deprivation of his right to effective assistance of counsel, is procedurally barred by the failure of new appellate counsel, who raised the issue of the government's belated disclosure, to also argue that issue under the rubric of ineffective assistance of counsel.

SO ORDERED.

Dated: New York, New York
December 26, 2000

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

97cv2971
Cedarbaum, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of March two thousand and one.

Present:

Hon. Joseph M. McLaughlin,
Hon. Sonia Sotomayor,
Circuit Judges.
Hon. William O. Bertelsman,
District Judge.

UNITED STATES COURT OF APPEALS
FILED MAR 14 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Joseph Massaro,

Movant-Appellant,

v. 00-2720

United States of America,

— Respondent-Appellee.

Appellant has filed a motion to expand the certificate of appealability issued by the district court. Upon due consideration, it is ORDERED that the motion is granted to the extent that

the certificate of appealability is expanded to include the following issue: whether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal. *See Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993). The parties are advised that the Court recently granted a certificate of appealability and heard argument on the following issue which is directly relevant to this case: whether the district court correctly found that a habeas petitioner must do more than merely make a bare allegation that his trial counsel ineffectively refused to allow him to testify in order to successfully attack his conviction. *See Chang v. United States*, USCA dkt. no. 99-2471; *see also Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991); *United States v. McMeans*, 927 F.2d 163 (4th Cir. 1991); *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989); *Siciliano v. Voss*, 834 F.2d 29 (1st Cir. 1987).

In all other respects appellant's motion is denied. *See Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984). Appellant has not made a "substantial showing of the denial of a constitutional right" with regard to the remaining issues on which the district court declined to grant a certificate of appealability. 28 U.S.C. § 2253(c).

FOR THE COURT
Roseann B. MacKechnie, Clerk
By: /s/ Lucille Carr

MAR 14 2001

SDNY-NYNY
92-cr-529
CEDARBAUM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-five.

Present:

HON. FRANK X. ALTIMARI,
HON. DENNIS G. JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED MAY 18 1995
George Lang III, Clerk
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v.- 94-1447

JOSEPH MASSARO, also known as
Joey Bang Bang,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Cedarbaum, *J.*), and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Defendant-appellant Joseph Massaro ("Massaro") appeals from a judgment entered, after trial to a jury, in the United States District Court for the Southern District of New York convicting him of conspiring to conduct and participate in the affairs of a racketeering enterprise in violation of 18 U.S.C. § 1962(d) ("RICO"); participating in the conduct of the affairs of the enterprise in violation of 18 U.S.C. § 1962(c); murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1), (2); three counts of extortion in violation of 18 U.S.C. §§ 1951 and 2; conspiracy to make extortionate extensions of credit and to use extortionate means to collect in violation of 18 U.S.C. §§ 892, 894; loansharking in violation of 18 U.S.C. §§ 893, 2; and traveling interstate in aid of the extortion racketeering counts in violation of 18 U.S.C. §§ 1952 and 2.

Massaro, a soldier of the Lucchese Organized Crime Family ("the Family"), ran a business called the Entertainment Plus Agency ("Monterrey") that booked topless dancers for local clubs. The evidence at trial demonstrated that, in an effort to take over Long Island's topless bar industry, Massaro waged a campaign of intimidation to persuade clubs and bars to book dancers through Monterrey rather than its competition. Toward this end, Massaro assaulted and threatened the owner of rival booking agency, "Tiffany's," Glen Hudson ("Hudson"), the owner, testified at trial. In early 1986, while Hudson was on vacation, Massaro and Patrick Esposito

("Esposito"), a cohort who became the government's key witness at trial, persuaded Hudson's business partner to accept Massaro as a partner in Tiffany's. Upon Hudson's return, he was met at the business by Esposito who told him that he could either accept a $10,000 pay-off to get out of the business, or wind up in the hospital. Instead, Hudson went to work for a new booking agency controlled by a different organized crime family. Massaro soon merged Tiffany's with his existing business and called the new enterprise "Startime."

In the late 1980s, Massaro sought to expand his control over Long Island's topless bar industry. An associate in Massaro's crew, Joseph Fiorito ("Fiorito"), twice tried to burn down the Carousel Lounge at Massaro's direction because it had defected from Startime. Esposito and Fiorito also set fire to the Excaliber and the Class Act Bar, clubs whose owners either refused to use Startime or declined to make pay-offs, or both. Three other area bars that had stopped using Startime were left alone because they were, by then, purportedly controlled by the Gambino Organized Crime Family.

Massaro also attempted to take over a non-topless bar in Babylon, Partner's Lounge ("Partner's"). After staging a robbery, Massaro began extorting the bar owner. However, by the time Esposito, with the Family's approval, decided to oust Gene Kruse ("Kruse"), the bar's owner, Kruse had gone to the Suffolk County District Attorney's Office. Kruse, who also testified at trial, began recording his conversations with Esposito, Fiorito and Massaro. Kruse began making his weekly payments in marked bills, and also arranged to borrow money from Massaro. In addition, Massaro and his henchmen extorted two construction industry firms, American Application Associates of New Jersey and Keith Gabel Construction, which together owed $75,000 to a business called Expert Rigging and Scaffolding. Massaro and Esposito collected the debts, pocketing half the payments. The two businesses complied because Massaro threatened their staffs

with physical injury, harm to their children, and union trouble. Finally, Massaro ran a successful loansharking operation, as well as an illegal horse betting parlor.

By the end of the summer of 1989, Massaro had determined to kill Fiorito because Fiorito had been stealing from him. Together with Esposito, Massaro lured him to an empty home located on Butterfly Lane in Hauppauge on September 19, 1990. After shooting Fiorito once in the head in the basement of the house, Massaro, with Esposito's help, carried the body up the stairs and through several rooms on the first floor before going out a side entrance. They placed the body in a sitting position on the rear seat of the car that had been driven by Fiorito, with the head resting on the middle of the seat. As they crossed into New York City, Massaro, expressing concern that Fiorito might not be dead, again shot him in the head. Massaro and Esposito pulled over in a Queens neighborhood and propped the body up so that it would appear to be sleeping. Leaving Fiorito's body in the car, the two left in a different vehicle with an associate who had followed them.

The next day, Massaro sent crew members to Butterfly Lane to clean up the basement and retrieve the shell casing. The men reported that they found the casing but that there was too much blood to be removed without special materials. Early on September 21, the New York City police discovered Fiorito's body, lying across the back seat of the parked car with the head pointing down toward the driver's side floor. The police found a spent shell casing on the floor behind the passenger seat, but no bullet. Likewise, they found no bullet and no blood in the front seat.

Although Esposito had retained counsel, he began cooperating with the government through court-appointed counsel. His information led the police to the murder scene where they discovered dried blood, remnants of brain matter, and a plastic bag in which the body had been wrapped when it was

carried through the house. Massaro was arrested in June 1992. After state criminal charges against Esposito were dismissed as a result of his cooperation, the car used to transport Fiorito's body, and in which he was shot for a second time, was released from state custody. It had not been thoroughly searched.

Trial commenced in the district court on September 7, 1993. Several days before trial, police sergeant Richard Carbone ("Carbone") succeeded in tracking down Fiorito's car. Carbone searched the car again, lifting up its carpeting, but found nothing. As an indirect result of this search, however, the new owner of the car discovered a hole in the floorboard, and a bullet. On September 6, 1993, the day before opening statements, the car's new owner advised the government of the discovery.

The defense's theory, as presented in its opening statement on Tuesday, September 7, 1993, was that Esposito alone murdered Fiorito. In the course of arguing that Massaro had no motive to murder Fiorito, and that no physical evidence linked him to the crime, counsel claimed that, "[t]here is no one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place, or had anything to do with this case. . . ." The government did not refer to the bullet in its opening statement.

On Saturday, September 11, 1993, the government advised, by faxed letter, Massaro's lawyer of the existence of the bullet, and offered to make available a videotaped reenactment of its discovery. When the trial resumed on Monday, counsel never mentioned the bullet. On Thursday, September 23, 1993, counsel raised the issue with the court and sought to expedite the ballistics tests. The government indicated that it did not yet know whether it would offer the bullet into evidence. Massaro neither sought to preclude the bullet, nor requested a continuance pending the forensic results. Sometime before trial on the following Monday, September 27,

1993, the government advised Massaro that its expert had concluded that the bullet matched the fragments recovered from the body, and had probably been fired from the same gun.

The next day, Massaro moved for a mistrial, or, in the alternative, to preclude admission of the bullet because of the late disclosure by the government. The district court rejected the motion for a mistrial and ruled that the bullet evidence was admissible because neither the opening statements nor the evidence adduced to date had irretrievably committed Massaro to a defense position. The court offered a continuance to allow Massaro to examine the evidence and make any necessary adjustments to his strategy. The court also allowed Massaro to recall any witnesses in light of the newly discovered evidence. Massaro recalled one investigator, but declined the continuance. Over objection, and after rejecting a motion for a mistrial, the district court admitted the bullet evidence.

We address Massaro's claim on appeal that the district court erred in admitting the bullet evidence. Massaro challenges the government's handling of the bullet evidence. Federal Rule of Criminal Procedure 16(a)(1)(C) requires the production by the government of any tangible items or documents "which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." Rule 16 rulings by the district court are reviewed for the abuse of discretion. *See United States v. Sanchez*, 912 F.2d 18, 21 (2d Cir. 1990). Reversal is warranted where nondisclosure by the government results in substantial prejudice to the defendant's ability to present a strategy. *Id.* In determining whether substantial prejudice has accrued, the Court looks to (1) the nature of the untimely evidence; (2) the extent to which it went to critical issues; (3) the reason that it was not timely produced; and (4)

the strength of the remainder of the government's case. *See United States v. Stevens*, 985 F.2d 1175, 1181 (2d Cir. 1993).

We conclude that, although the government's five-day delay in advising the defense of the discovery of the bullet was regrettable, it was not error to admit the evidence. There is no question but that the government should have advised the defense immediately of the bullet's discovery. However, the government's conduct did not irreparably damage Massaro's strategy. Massaro had given his opening statement and begun cross-examination of Esposito before learning about the bullet. Massaro has not claimed that he would have changed his cross-examination had he been aware of the bullet. Thus, we address only the opening statement.

Massaro's defense strategy was to impugn Esposito's credibility by arguing that it was inherently incredible, given the lack of hard evidence, that the second shot ever occurred. He intended to argue to the jury that, if Esposito could not be believed in this detail, none of his testimony was trustworthy. Nothing in his opening statement, however, was rendered false by the bullet evidence. That fact makes this case distinguishable from *People v. Thompson*, 71 N.Y.2d 918, 523 N.E.2d 819, 528 N.Y.S.2d 532 (1988), upon which Massaro relies. There, the New York Court of Appeals reversed a conviction because the government withheld a witness's prior statement until the defense was already irrevocably committed to its strategy of suggesting that the witness was not credible. In this case, the district court properly determined that Massaro had not yet committed himself to an untenable position. Further, the defense had ample other detrimental information with which to attack Esposito's credibility. Massaro's rejection of a continuance supports our conclusion. Massaro cites *United States v. Kelly*, 420 F.2d 26, 29 (2d Cir. 1969), for the proposition that a continuance would not have adequately addressed the problem. In fact, the *Kelly* court suggested that it was error not to grant a continuance, *id.* at

29, thus implying that a continuance would have cured the injury. Massaro's failure to avail himself of the offer of a continuance calls into doubt the claim of error. *See, e.g., United States v. Boney*, 572 F.2d 397, 402-03 (2d Cir. 1978). Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim. We cannot conclude that there was substantial prejudice to Massaro as a result of the government's delay in advising the defense of the bullet's discovery; the district court did not abuse its discretion in admitting the evidence.

Massaro's remaining claims having been carefully considered, we AFFIRM the judgment of the district court.

/s/ Frank X. Altimari

HON. FRANK X. ALTIMARI.

/s/ Dennis Jacobs (by FXA)

HON. DENNIS JACOBS.

/s/ Guido Calabresi (by FXA)

HON. GUIDO CALABRESI.

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT